

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 1316 OF 1998

IN

NOTICE OF MOTION NO. 1087 OF 1998

IN

SUIT NO. 214 OF 1997

1. Mrs. Beryl Murzello)
of Bombay Indian Inhabitant,)
residing at 301, Rodhol Apartments,)
18, St. Roque Road, Bandra (W),)
Mumbai-400 050.)
2. Owen Dias)
of Bombay Indian Inhabitant,)
C/o Adrian Dias, Dias House,)
Silva Street, Versova Village,)
Andheri (W), Mumbai-400 061.)
3. Mrs. Thelma Fernandes)
of Bombay Indian Inhabitant,)
Theophil, 23-E Gundavali,)
Andheri (E), Mumbai-400 069.)
4. Mrs. Yvonne D'Souza)
of Bombay Indian Inhabitant,)
37, Gundavali, Andheri (E),)
Mumbai-400 069.)
5. Adrian Dias)
of Bombay Indian Inhabitant,)
Dias House,)
Silva Street, Versova Village,)
Andheri (W), Mumbai-400 061.)
6. Roy Dias)
of Bombay Indian Inhabitant,)
Dias House,)
Silva Street, Versova Village,)
Andheri (W), Mumbai-400 061.)
7. Rev. Fr. Chelston Dias)
C/o Adrian Dias, Dias House,)
Silva Street, Versova Village,)
Andheri (W), Mumbai-400 061.)
8. Brian Dias)

- of Bombay Indian Inhabitant,)
Dias House,)
Silva Street, Versova Village,)
Andheri (W), Mumbai-400 061.)
9. Mrs. Whilma D'Souza)
of Bombay Indian Inhabitant)
"Pearl Queen", Azad Road,)
Vile Parle (E), Mumbai-400 057.)
10. Mrs. Carol Ethina Bayross)
of Bombay Indian Inhabitant,)
La Paloma, Joe Braz Colony,)
Orlem, Malad (W),)
Mumbai-400 064.)
11. Mrs. Elsie Dias)
of Bombay Indian Inhabitant,)
Michellette, Vakola Pipe Line,)
Vakola, Santacrus (E),)
Mumbai-400 054.)
12. Sister Flavina Dias)
of Bombay Indian Inhabitant,)
Michellette, Vakola Pipe Line,)
Vakola, Santacrus (E),)
Mumbai-400 055.)
13. Ashton Dias)
of Bombay Indian Inhabitant,)
Michellette, Vakola Pipe Line,)
Vakola, Santacrus (E),)
Mumbai-400 055.)
14. Mrs. Faye Alvares)
of Bombay Indian Inhabitant,)
Michellette, Vakola Pipe Line,)
Vakola, Santacrus (E),)
Mumbai-400 055.)
15. Mrs. Freda Alvares)
of Bombay Indian Inhabitant,)
Michellette, Vakola Pipe Line,)
Vakola, Santacrus (E),)
Mumbai-400 055.)
16. Mrs. Franzina Cerejo)
of Bombay Indian Inhabitant,)
Michellette, Vakola Pipe Line,)
Vakola, Santacrus (E),)
Mumbai-400 055.)

17. Adrigh Dias)
of Bombay Indian Inhabitant,)
Michellette, Vakola Pipe Line,)
Vakola, Santacrus (E),)
Mumbai-400 055.)
18. Joseph Robert Dias)
of Bombay Indian Inhabitant,)
Dias House,)
Silva Street, Versova Village,)
Andheri (W), Mumbai-400 061.)
19. Khanderao Bhikaji Joshi)
of Bombay Indian Inhabitant,)
carrying on business in the name)
and style of M/s K.B. Joshi &)
Associates, as sole proprietor)
thereof, having office at)
Shiv Tirth, 5th Floor,)
Dr. M.B. Raut Road,)
Shivaji Park, Dadar,)
Mumbai-400 014.)
20. M/s Anuman Developers)
a duly constituted partnership firm)
registered under the Partnership)
Act, having its office at 3 & 4,)
Crystal Towers, Off M.V. Road,)
Andheri (E), Mumbai-400 069.) .. Appellants

Versus

1. Ramchandra Bhairo Mane)
2. Laxman Bhairo Mane)
both of Bombay Indian Inhabitants,)
R.B. Mane Chawl, Kevni Pada,)
Borivli (E), Mumbai-400 066.)
3. Maulana Mohammed Sajidali)
Muslim, of Bombay Indian Inhabitant)
Ganesh Nagar, Jijamata Chowk,)
Pump House, Andheri (E),)
Mumbai-400 093.)
4. Abdul Subbhan Khan)
of Bombay Indian Inhabitant,)
Gulshan Nagar, Jogeshwari (W),)
Mumbai-400 102.)
5. Jahengir Mohammed Shaikh)
of Bombay Indian Inhabitant)
Ganesh Nagar, Jijamata Chowk,)

- Pump House, Andheri (E),)
Mumbai-400 093.)
6. Aziz Moosa Memon)
of Bombay Indian Inhabitant)
Ganesh Nagar, Jijamata Chowk,)
Pump House, Andheri (E),)
Mumbai-400 093.)
7. Chaganbhai Manjibhai Patel)
of Bombay Indian Inhabitant,)
Brahmin Society, Navpada, Thane.)
8. Tapovan Developers Pvt. Ltd.)
having their office at)
12, Parvati Niwas, 1st Floor,)
Chandavarkar Lane,)
Borivli (W), Mumbai-400 092.)
9. Thomas P. Miranda)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)
Mumbai-400 055.)
10. Mathew P. Miranda)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)
Mumbai-400 055.)
11. Mrs. Lilly M. Jacinto)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)
Mumbai-400 055.)
12. Caeser S. Miranda)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)
Mumbai-400 055.)
13. Donald P. Miranda)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)

- Mumbai-400 055.)
14. Mrs. Clara Gonsalves)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)
Mumbai-400 055.)
15. Mrs. Cecilia Gonsalves)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)
Mumbai-400 055.)
16. Ms. Mary Perreira)
of Bombay Indian Inhabitant,)
Cyprian House, Next to Masjid,)
Off Kalina-Vakola Road,)
Vakola, Santacruz (E),)
Mumbai-400 055.) .. Respondents

Mr.M.U. Pandey for the Appellants.

Mr.V.R. Walawalkar with Mr.S.R. Bhalekar for
Respondent No.8.

AND

APPEAL NO. 1317 OF 1998

IN

NOTICE OF MOTION NO. 1086 OF 1998

IN

SUIT NO. 215 OF 1997

1. Arun Vasant Patil)
2. Vasanti Vasant Patil)
both residing at Shanti Sadan,)
Mukund Patil Road, Andheri (W),)
Bombay-400 058.)
3. Sudha K. Raote)
residing at Raote Building,)
Banam Lane, Girgaum,)

- Bombay-400 004.)
4. Satish Shriram Patil)
residing at Vrundavan Co-op.)
Hsg. Soc., Bldg. No.7,)
Thane (West).)
5. Jagdish Shriram Patil)
residing at Parashuram Bldg.,)
Jay Prakash Road, Andheri (W),)
Bombay-400 058.)
6. Prakash Kesharinath Patil)
7. Smita Kesharinath Patil)
8. Rashmi Madhav Sawant)
all residing at Manav Kalyan)
Society, A/1/6, 1st Floor,)
Bangar Nagar, M.G. Road,)
Goregaon (W), Bombay-400 090.)
9. Vijaya Madhav Patil)
residing at "Smuriti",)
Dr. Vasant Raj Road, Shivaji Pari,)
Bombay-400 028.)
10. Rajeev Madhav Patil)
residing at Madhavi Co-op. Hsg.)
Soc., Mogal Lane, Mahim,)
Bombay-400 016.)
11. Kastur G. Patil)
residing at Windsor House,)
Maharshi Karve Road,)
Churchgate, Bombay-400 020.)
12. Arvind Jaywant Patil)
13. Suren Jaywant Patil)
both residing at Vasant Niwas)
Jay Prakash Road, Andheri (W),)
Bombay-400 058.)
14. Smt. Sandhya Sandesh Bhatte)
residing at Sandesh, Dawood Baug,)
Andheri (W), Bombay-400 058.)
15. Chandrakant Balkrishna Patil)
16. Milind Chandrakant Patil)
both residing at Vasant Niwas,)
Jay Prakash Road, Andheri (W),)
Bombay-400 058.)
17. Sudhir Prabhakar Patil)

- residing at Shanti Niwas,
1st Floor, Jai Prakash Road,
Andheri (W), Bombay-400 058.)
)
)
18. Kishor Prabhakar Patil)
residing at Patel Palace,)
Jivan Vikas Kendra Marg,)
Sahar Road, Andheri (E),)
Bombay-400 069.)
)
19. Kusum Prabhakar Patil)
residing at Sai Pratha,)
Shantawadi, J.P. Road,)
Andheri (W), Bombay-400 058.)
)
20. Nutan Dilip Chalkar)
residing at Man Mandir,)
Block No.201, Dahisar (W),)
Bombay-400 098.)
)
21. Shridhar Rahunath Patil)
22. Vinay Shridhar Patil)
23. Abhay Shridhar Patil)
all residing at Sarkar Co-op.)
Hsg. Soc., Veera Desai Road,)
Andheri (W), Mumbai-400 058.)
)
24. Kundaala Diwakar Parelkar)
residing at Kshtriya Building,)
Anant Patil Road, Gokhale Road,)
Dadar, Bombay-400 028.)
)
25. Shakuntala Raghunath Patil)
residing at Shanti Niwas, 1st Floor)
Jay Prakash Road, Andheri (W),)
Bombay-400 058.)
)
26. Pandharinath Yeshwant Patil)
residing at Shanti Niwas, 3rd Floor)
Jay Prakash Road, Andheri (W),)
Bombay-400 058.)
)
27. Smt. Prabhavati Rajaram Nawalkar)
residing at Sai Darshan Co-op.)
Hsg. Soc., Malpa Dongri,)
Mahakali Road, Andheri (E),)
Bombay-400 093.)
)
28. Dinesh K. Shah)
of Bombay Indian Inhabitant,)
carrying on business in the name)
and style of Jyoti Construction Co.)
)

as the sole proprietor thereof,)
having its office at 3rd Floor,)
Rehman Building, Veer Nariman Road,)
Fort, Bombay-400 023.)

29. Manish Vijay Enterprises)
a partnership firm duly registered)
under the Indian Partnership Act,)
having its office at 3 & 4, Crystal)
Towers, Off M.V. Road,)
Andheri (E), Bombay-400 069.)

30. M/s Anuman Developers)
a duly constituted partnership firm)
registered under the Partnership)
Act, having its office at 3 & 4,)
Crystal Towers, Off M.V. Road,)
Andheri (E), Mumbai-400 069.)

.. Appellants

Versus

1. Ramchandra Bhairo Mane)
2. Laxman Bhairo Mane)
both of Bombay Indian Inhabitants,)
R.B. Mane Chawl, Kevni Pada,)
Borivli (E), Mumbai-400 066.)

3. Maulana Mohammed Sajidali)
Muslim, of Bombay Indian Inhabitant)
Ganesh Nagar, Jijamata Chowk,)
Pump House, Andheri (E),)
Mumbai-400 093.)

4. Abdul Subbhan Khan)
of Bombay Indian Inhabitant,)
Gulshan Nagar, Jogeshwari (W),)
Mumbai-400 102.)

5. Jahengir Mohammed Shaikh)
of Bombay Indian Inhabitant)
Ganesh Nagar, Jijamata Chowk,)
Pump House, Andheri (E),)
Mumbai-400 093.)

6. Aziz Moosa Memon)
of Bombay Indian Inhabitant)
Ganesh Nagar, Jijamata Chowk,)
Pump House, Andheri (E),)
Mumbai-400 093.)

7. Tapovan Developers Pvt. Ltd.)
having their office at)

12, Parvati Niwas, 1st Floor,)
Chandavarkar Lane,)
Borivli (W), Mumbai-400 092.) .. Respondents

Mr.M.U. Pandey for the Appellants.

Mr.V.R. Walawalkar with Mr.S.R. Bhalekar for
Respondent No.7.

CORAM : R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATE : 15TH MARCH 2007

ORAL JUDGMENT: (Per R.M.S. Khandeparkar, J.)

1. Since common questions of law and facts arise in both these appeals, they have been heard together and are being disposed of by this common judgment.

2. Both these appeals have been filed against the dismissal of notices of motion taken out by the Appellants-Plaintiffs for decree on alleged admission by the original Defendant No.3 about the rights of the Appellants to the property in question.

3. It is the contention on behalf of the Appellants that the Respondent No.3 (original Defendant No.3) has admitted that the earlier decree was obtained by fraud

and that Defendant No.3 has no right whatsoever to the property in question and that, therefore, on this admission itself, the Appellants' claim of the ownership right to the property in question should be decreed as against the Defendant No.3, invoking the provisions of Order XII Rule 6 of the Code of Civil Procedure.

4. The claim of the Appellants is disputed by other Defendants while contending that the stand taken by the Defendant No.2 in relation to the claim of ownership to the suit property by the Appellants is in collusion with the latter to the detriment of the rights of the said Defendants to the suit property. The learned Single Judge, after taking into consideration various aspects of the matter including the point that the Appellants-Plaintiffs themselves had joined the other Defendants as the parties to the suit on the basis of their claim of ownership right through the Defendant No.3 consequent to certain agreements entered into between the Defendant No.3 and those Defendants in relation to the property in question, has held that it would not be appropriate to decree the suit against the Defendant No.3 on the alleged admission. In the facts and circumstances of the cases, we find no infirmity in the said finding and, therefore, on that count itself, the interference with the impugned order is not called for.

5. It is not in dispute that the Appellants themselves have chosen to join those Defendants as the parties to the suit on the basis that the Appellants had learnt about the agreements between the Defendant No.3 and those Defendants in relation to the suit property, and that consequently those Defendants are seeking to claim right to the suit property. Besides, it is a matter of record that those Defendants have stated on oath that there has been a collusion between the Appellants-Plaintiffs and the Defendant No.3 and as a result thereof, the said statement has been made by the Defendant No.3 in the Written Statement about the admission of the claim of the Appellants-Plaintiffs solely with the intention of defeating the right acquired by those Defendants through the Defendant No.3.

6. The law on the point that the suit can be decreed on admission in exercise of powers under Order XII Rule 6 of the Code of Civil Procedure is well settled. In order to decree the suit on the basis of the admission, the same should be unequivocal, unambiguous and clear in all respects revealing the fact that the Plaintiffs' case in relation to the claim in the suit has been clearly admitted by the Defendants or the concerned Defendant. That is not the case in the

matter in hand. Admittedly, there is a dispute between the Appellants-Plaintiffs and the other Defendants who are claiming right to the property through the Defendant No.3. Whether the Defendant No.3 really had the ownership right in the property and/or had the right to convey the property in favour of those Defendants, and in fact had conveyed such right in their favour, are the issues which are required to be gone into at the time of trial and necessary adjudication in that regard is required. In the circumstances, therefore, it would be too premature to decree the suit against the Defendant No.3, on the basis of the alleged admission, in exercise of powers under Order XII Rule 6 of the Code of Civil Procedure.

7. The provisions of law comprised under Order XII Rule 6 of the Code of Civil Procedure are enabling provisions. Undoubtedly, the same confer wide powers on the court to pronounce judgment on admission at any stage of the proceedings. However, it does not mean that the decree always be granted in terms of prayers in the suit on the basis of admission. The Court has duty to ascertain whether the plaintiff is entitled under the law to get the relief asked for. The Court has to guard itself from allowing the parties to play fraud upon the Court by entering into collusion to defeat not only the

provisions of law but even the rights accrued in favour of any other party, whether before the Court or not, but one disclosed from the records before it. The judgment on admission is not a matter of right. It is a matter of discretion of the Court to be exercised judiciously and depending upon the facts and circumstances of the case.

8. The learned advocate for the Appellants has drawn our attention to the decision of the Apex Court in **Uttam Singh Dugal & Co. Ltd. v. Union Bank of India** reported in AIR 2000 SC 2740 and of the learned Single Judge of this Court in **Pransukhlal Mafatlal Hindu Swimming Boat Club Trust v. Vasant Joshi** reported in 2004(2) Mah.L.J. 765. As regards the decision of the Apex Court in Uttam Singh's case, that was a case wherein the Plaintiffs filed the suit for recovery of money and in that regard there was certain facts stated in reply to the claim of the Plaintiffs. In the very decision, the Apex Court has referred to its earlier decision in the matter of **Razia Begum v. Sahebzadi Anwar Begum** reported in AIR 1958 SC 886. That was a case wherein a suit was filed under sections 42 and 43 of the Specific Relief Act, 1877. The Apex Court, referring to that case, observed as under:-

"The Court is not bound to grant declaration prayed for on the mere admission of the claim by the defendant if the Court has reason to insist upon a clear proof apart from admission. The result of a declaratory decree confers status not only on the parties but for generations to come and so it cannot be granted on a rule of admissions and, therefore, insisted upon adducing evidence independent of the admission."

9. Undisputably, in the suit in question, the Appellants are claiming a declaration of ownership rights. The decree under Order XII Rule 6 of the Code of Civil Procedure is not always as a matter of right. The Court has to take into consideration all the relevant circumstances which could justify grant of such decree. In cases where the Court thinks it appropriate to insist for the evidence in support of the claim of the Plaintiff, irrespective of the statements made by the Defendant in the Written Statement, nothing prevents the Court from requiring the Plaintiff to prove his case. Being so, in a case wherein the Plaintiff himself approaches the Court stating that on account of certain acts on the part of the concerned Defendant, the third parties are claiming some right to the property in question and on that count those parties are joined as

the Defendants to the suit, merely because one of the Defendants has made some admission regarding the claim of the Plaintiff, unless the rights which have been claimed by the third party through such Defendant are adjudicated upon, it would be too premature for the Court to decree the suit in relation to such property merely on the basis of any admission made by the concerned Defendant.

10. As regards the decision of the learned Single Judge, that was a case wherein it was held that admissions made even in the course of the trial before the criminal court can be taken into consideration while exercising the powers under Order XII Rule 6 of the Code of Civil Procedure. That was totally in different set of facts. The decision is not at all attracted in the facts of the case in hand. Therefore, the decision is of no help to the Appellants herein.

11. For the reasons stated above, we do not find any justification for interference with the impugned order and hence both the appeals fail and hereby dismissed with no order as to costs.

(R.M.S. KHANDEPARKAR, J.)

(D.G. KARNIK, J.